IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

STATE OF TENNESSEE v. LISA MYERS

Appeal from the Criminal Court for Sullivan County
Nos. S49,030 through S49,034 R. Jerry Beck, Judge

No. E2005-01547-CCA-R3-CD - Filed August 30, 2006

The defendant, Lisa Myers, appeals her Sullivan County effective incarcerative sentence of eight years on her guilty-pleaded convictions of Class D theft and two worthless checks. The defendant had sought a probationary sentence or some other form of alternative sentencing, which the trial court rejected. Our review of the record discloses no basis to disturb the trial court's sentencing decision, and we affirm the judgments.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ROBERT W. WEDEMEYER, JJ., joined.

Stephen M. Wallace, District Public Defender; and Joe Harrison, Assistant District Public Defender, for the Appellant, Lisa Myers.

Paul G. Summers, Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Rebecca H. Davenport, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On February 15, 2005, the defendant pleaded guilty in the Criminal Court for Sullivan County to several crimes, namely a violation of probation in S45,518 and indictments S49,030 through S49,034. The trial court ordered the defendant to serve the four-year sentence in S45,518, and the plea agreement specified the length of service for the other indictments' charges. The agreement left the manner of service to the determination of the trial court. The dispositions of S49,030 through S49,034 are as follows:[1]

---

[1] Summary excludes court costs and fines.

Case	Offense	Class	Range	Sentence	Alignment
S49,030	Theft > $1,000	D felony	III	8 years	consecutive to S49,033; S49,034; and S45,518
S49,031	Worthless Check	A misdemeanor	N/A	11months, 29 days	concurrent with S49,030; consecutive to S49,033; S49,034; and S45,518
S49,032	Worthless Check	A misdemeanor	N/A	11 months, 29 days	concurrent with S49,030; consecutive to S49,033; S49,034; and S45,518
S49,033(1)	Identity Theft	D felony	III	8 years	concurrent with counts 2-7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
(2)	Criminal Simulation	E felony	III	4 years	concurrent with counts 1, 3-7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
(3)	Criminal Simulation	E felony	III	4 years	concurrent with counts 1-2, 4-7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
(4)	Identity Theft	D felony	III	8 years	concurrent with counts 1-3, 5-7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518

(5)	Identity Theft	D felony	III	8 years	concurrent with counts 1-4, 6-7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
(6)	Identity Theft	D felony	III	8 years	concurrent with counts 1-5, 7 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
(7)	Theft > $1,000	D felony	III	8 years	concurrent with counts 1-6 and S49,034; consecutive to S49,030; S49,031; S49,032; and S45,518
S49,034(1)	Theft < $500	A misdemeanor	N/A	11 months, 29 days	concurrent with count (2) and S49,033; consecutive to S49,030; S49,031; S49,032; and S45,518
(2)	Identity Theft	D felony	III	8 years	concurrent with count (1) and S49,033; consecutive to S49,030; S49,031; S49,032; and S45,518

Thus, the plea agreement, which was approved by the trial court, resulted in an effective eight-year incarcerative sentence for indictments S49,030, S49,031, and S49,032 to run consecutively to an effective eight-year probationary sentence for indictments S49,033 and S49,034. The agreement specified that both eight-year periods were to run consecutively to the four-year incarcerative sentence in S45,518. The total effective sentence, as a result of the agreement, was 20 years as a Range III[2] offender, the last eight years of which are to be served on supervised probation. The defendant submitted the manner of service of her eight-year sentence in S49,030, S49,031, and S49,032 to the determination of the trial court.

[2]The defendant qualifies as a career offender, *see* Tenn. Code Ann. § 40-35-108 (2003), due to her lengthy criminal history; however, under the plea agreement, she pleaded guilty as a persistent offender, *see id*. § 40-35-107.

At the sentencing hearing, the defendant presented mitigation evidence by testifying on her own behalf. She stated that she has two minor sons. Her parental rights were terminated for the older child, age 14, and the younger child, age 12, was adopted by his paternal grandparents when he was three months old. The defendant testified that her younger son was experiencing behavioral problems and that his grandparents were in poor health. She requested that the trial court order some form of alternative sentencing so that she could help the grandparents raise her son. She stated that she would live with her mother instead of moving to Maryland, as she originally requested.

On cross-examination, the defendant acknowledged her extensive criminal record. According to the presentence report, she has been convicted approximately 120 times for various financial crimes. The defendant also acknowledged her five previous charges for violation of probation in multiple counties.[3] She admitted that she was unemployed and that she had charges pending in Bristol, Virginia.

The trial court found no mitigation, and the court based its sentencing decision on the defendant's lengthy criminal record and the presentence report. Regarding the defendant's criminal record, the trial court stated, "It's just a horrendous prior record and the [c]ourt does realize they are property crimes that don't involve violence, . . . but she's got a lot of cases. It would not favor probation." The trial court also noted her sporadic employment, her pending cases in Virginia, and her committing the current offenses while on probation. Therefore, the trial court ordered her to serve the eight years as a Range III offender.

On appeal, the defendant argues that the trial court should have granted an alternative sentence. We disagree and affirm the judgments of the lower court.

Our standard of review is a familiar one. When the length, range, or manner of service of a sentence is disputed, this court undertakes a de novo examination of the record with a presumption that the determinations reached by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). The presumption, however, is predicated "upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). "The burden of showing that the sentence is improper is upon the appellant." *Id*. Should the record fail to reflect the required consideration by the trial court, review of the sentence is purely de novo. *Id*. On the other hand, should the record show that the trial court properly took into account all pertinent factors and that its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In arriving at a sentence, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then decides the specific sentence and the propriety of

[3]The defendant admitted to five violations of probation, although only three such violations appeared in the presentence report.

sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered on enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) & -35-103(5) (2003);[4] *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who is an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2003). Nevertheless, a defendant who commits "the most severe offenses, possesses a criminal history evincing a clear disregard for the laws and morals of society, and [has failed] past efforts at rehabilitation" does not enjoy the presumption. *Id*. § 40-35-102(5), (6); *see State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Furthermore, a defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5) (2003). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The record in this case reflects that the trial court engaged in a proper review of the relevant sentencing principles and considerations. Accordingly, its sentencing determinations are entitled to the presumption of correctness.

As a persistent offender, the defendant in the present case did not enjoy the presumption of favorable candidacy for alternative sentencing. *See* Tenn. Code Ann. § 40-35-102(6). In this situation, the state had no burden to justify a sentence involving incarceration. *See, e.g., State v. Michael W. Dinkins*, No. E2001-01711-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Apr. 26, 2002); *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 4, 2000); *see* Tenn. Code Ann. § 40-35-103(1). Thus, the burden of establishing suitability for alternative sentencing rested upon the defendant, and she has failed to demonstrate on appeal that she carried this burden below.

Such was a difficult burden in the present case when the presentence report showed the defendant's "long history of criminal conduct," Tenn. Code Ann. § 40-35-103(1)(A), and the defendant's testimony in the sentencing hearing established five previous violations of probation. Hence, the record that is before us establishes a solid basis for denying alternative sentencing. *See*

[4] Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* 2005 Tenn. Pub. Acts, ch. 353, §§ 5, 6. These sections were replaced with language rendering the enhancement factors advisory only and abandoning a statutory minimum sentence. *See* Tenn. Code Ann. §§ 40-35-114 (2005) ("the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"), -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines.").

id. § 40-35-103(1)(C) (confinement may be based, *inter alia*, upon a finding that "[m]easures less restrictive than confinement have . . . recently been applied unsuccessfully to the defendant").

As for the trial court's rationale for denying alternative sentencing, it is clear from the record that the trial court relied primarily upon the defendant's prodigious record of offending. The judge explicitly noted that the defendant's prior criminal record was the primary basis for denying alternative sentencing. At one point, the judge said, "It's just a horrendous prior record." We agree with the trial court, and we will not belabor our explanation.

The record supports the trial court's finding of a significant criminal history and the court's reliance upon that history when denying alternative sentencing options. *See id*. § 40-35-103(1)(A). Furthermore, upon our de novo review, we notice that the defendant's prior record of violating probation also justifies a denial of alternative sentencing. *See id*. § 40-35-103(1)(C). Thus, we discern no reversible error and affirm the judgments of the trial court.

We do discern, however, an apparent clerical error in the judgment in case number 49,033, count three. The judgment states that it imposes a conviction of criminal impersonation. The defendant pleaded guilty to criminal simulation. On remand, the trial court shall correct the judgment on this count.

_____

JAMES CURWOOD WITT, JR., JUDGE